

STATE OF MICHIGAN
COURT OF APPEALS

CB MARTIN ENTERPRISES, L.L.C.,

Plaintiff-Appellee,

v

TCM PROGRESSIVE, INC., d/b/a
PROGRESSIVE LIFT TRUCK SERVICES, INC.,
and ALAN RICE,

Defendants-Appellants.

UNPUBLISHED
February 21, 2006

No. 263739
Oakland Circuit Court
LC No. 2003-050737-CK

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendants appeal as on leave granted the summary dismissal of this breach of contract action in plaintiff's favor.¹ We affirm.

On June 24, 2003, plaintiff filed its complaint against defendant, TCM Progressive, Inc., asserting open account and breach of contract claims and averred that, between December of 2001 and December of 2002, plaintiff provided various personnel, payroll, tax management and other services for defendant and defendant failed to pay for those services in the amount of \$64,946.15. Defendant answered plaintiff's complaint with a denial that it owed plaintiff the sum asserted. Subsequently, plaintiff moved to amend its complaint to add (1) two defendants—an individual corporate representative, Alan Rice, as well as a purported successor corporation, Progressive Lift Truck Services, Inc., and (2) a fraudulent conveyance claim on the ground that defendant, TCM Progressive, through its representative, Rice, fraudulently conveyed its assets to Progressive Lift in an attempt to defraud creditors. The motion was granted.

Thereafter, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no question of material fact that nine invoices were due and owing from defendants to plaintiff totaling \$64,946.15, not including tax. Plaintiff argued that defendants'

¹ Although defendants assert that they are appealing as of right, we note that the order appealed from does not appear to be a final order disposing of the entire case but, because plaintiff has not challenged jurisdiction and in the interest of judicial economy, we will treat defendants' claim of appeal as an application for leave to appeal and will grant the same. See *SNB Bank & Trust v Kensey*, 145 Mich App 765, 770; 378 NW2d 594 (1985).

defense for failing to pay the invoices—that they were “overcharged” for services rendered—was unsupported by any evidence. Defendants responded to plaintiff’s motion, arguing that they were overcharged for the services² and attached the affidavit of defendant Rice in support of their position. The trial court heard oral arguments and thereafter granted plaintiff’s motion, holding that defendants failed to establish a genuine issue of material fact that plaintiff was not entitled to payment for services rendered as pleaded in its complaint. The court noted that the only evidence submitted by defendants in support of their defense was an insufficient affidavit because the affiant testified in his deposition that he did not know how much defendants were allegedly overcharged. The court also held that the affidavit was incompetent because it was filled with hearsay and argument. The court ordered summary disposition as to TCM Progressive and judgment in the amount of \$93,197.66 was entered accordingly. Defendants appeal.

First, defendants argue that the trial court committed legal error in granting plaintiff’s motion for summary disposition on the open account claim because it failed to review the record in the light most favorable to defendants. After review de novo of the trial court’s decision to grant summary disposition on the ground that there was no genuine issue of material fact, we disagree. See MCR 2.116(C)(10); *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

Defendants claim that “[t]he trial court ignored depositions of witnesses, Alan Rice, Beth Rice and David Rice, answers to interrogatories, other documentary evidence and counter affidavit in evaluating whether factual issues had been raised for trial. Such provided reasons and calculations as to why defendant [sic] believed it had been overcharged by plaintiff for employee leasing services and benefits costs.” We note that defendants are correct that, in ruling on a motion for summary disposition under MCR 2.116(C)(10), a trial court must consider affidavits, depositions, admissions and other documentary evidence *submitted* in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Here, the only documentary evidence submitted to the trial court by defendants was the purported affidavit of one of the defendants, Alan Rice. Consequently, defendants’ claim that the trial court ignored depositions of witnesses, answers to interrogatories and other documentary evidence is unsupported by the record and, thus, is without merit. It is axiomatic that a trial court cannot consider evidence that is not tendered. Mere references to deposition testimony, most without even page citations, does not constitute documentary evidence. See *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998).

As for the affidavit of Alan Rice submitted by defendants, it was properly deemed insufficient by the trial court. The affidavit failed to establish a genuine issue of material fact that defendants were “overcharged” for the services rendered. Attempts to decipher the convoluted argument set forth in the affidavit reveal that defendants may have deemed its assertions like “Defendant [sic] has setoffs against plaintiff and Kadoura for more than \$60,000

² The primary argument posited by defendants in their answer to plaintiff’s motion consisted of the following sentence: “Defendants state that Plaintiffs [sic] have overcharged the Defendant [sic] and have failed to account for sums received by Plaintiff.”

for hidden profits and excessive charges invoiced by them” and “Defendant [sic] states that the invoices concealed the overcharges” sufficient to overcome its burden of showing a genuine issue of material fact. MCR 2.116(G)(4). It is not. First, defendants failed to set forth specific facts admissible as evidence in support of the allegations, MCR 2.119(B)(1)(b), and, second, the affiant testified in his deposition that he had never calculated how much they were overcharged. “[P]arties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition.” *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001) (citations omitted). In sum, the trial court did not err, on the ground asserted by defendants, in granting plaintiff’s motion for summary disposition on the open account claim.

Next, defendants argue that the trial court erred “in refusing to require plaintiff to provide an accounting for services charged and money received from its business relationship with defendant [sic] and in failing to grant defendant’s [sic] request for summary disposition on plaintiff’s fraudulent conveyance count.” We disagree.

Defendants’ entire argument in support of the claim that the trial court erred in failing to require plaintiff to provide an accounting consists of the following “[t]he trial court ignored defendant’s [sic] prayer for an accounting in concluding that the affidavit filed by plaintiff won its case.” This is insufficient. It is well established that to properly present an appeal the appellant must appropriately argue the merit of the issues he raises, may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, and may not give issues cursory treatment with little or no citation of supporting authority. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). The issue is deemed abandoned.

Finally, defendants claim that the trial court erred in failing to grant its request for summary disposition on plaintiff’s fraudulent conveyance count. Defendants argue that in their answer to plaintiff’s motion for summary disposition they “raised the question that there was no factual support to support its amended count for fraudulent conveyance” It appears that defendants are referring to one sentence in their answer to the motion that was located under the heading “summary of defendants’ positions” and which states “Furthermore, defendants deny a fraudulent transfer or conveyance took place as now alleged by plaintiff and at best there are issues of fact for the court or the court should dismiss such claim for lack of any evidence to support same.” But, as illustrated in the transcript on the motion for summary disposition, the trial court expressly declined to consider the issue because defendants had not properly raised the issue in a motion and thus it was not before the court. We decline to address this issue that was not presented to, or decided by, the trial court. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Henry William Saad